Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
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81-130

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

WESTERN MINING COUNCIL, et al.,

Petitioners,

v.

JAMES G. WATT, Secretary of the Interior of the United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
IN CASE No. 78-2669

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QUESTIONS PRESENTED

1. Whether plaintiffs had standing to sue for declaratory relief when they had not been prosecuted or threatened with criminal prosecution under the Federal Land Policy and Management Act of 1976 (FLPMA) prior to filing their complaint.

2. Whether plaintiffs had standing to sue for declaratory relief where plaintiffs' vested rights of ownership of their unpatented mining claims were retroactively changed from ownership as a matter of right to a matter of grace, in the absolute discretion of an authorized officer under an amendment of the mining law by the 1976 Act.

3. Whether plaintiffs stated a "case or controversy" by challenges to the constitutionality of 43 USC §§ 1701(a)(1), 1701(a)(3), 1732(b), 1733(a), (c), (g) and (e), 1734(b), 1735(a), 1740, 1744, 1761 to 1764, and 1781(c), alleging violation

of the Fourth, Fifth and Sixth Amendments, Article IV §3, and the two-year limitation upon appropriation for armies found in Article I §8 clause 12 of the Constitution of the United States.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following parties plaintiff were named: Robert G. Wright, Cal-Ore Chapter Western Mining Council, Barney McClendon, Jr., Nor-Cal Chapter Western Mining Council, Richard Arbo, Hayfork Chapter Western Mining Council, Larry Cordtz, Prospectors & Miners Chapter of Shasta County, Western Mining Council, Carl Ripatte, Mother Lode Miners Association Chapter of Western Mining Council, Pat Crombie, Northern Mining Council Chapter of Western Mining Council, Barney Green, Los Angeles County Chapter Western Mining Council, Robert Sanders, Tuolumne Chapter Western Mining Council, Emmett Dahl, Santa Clara County Chapter Western

Mining Council, Ron Reeves, Mariposa County Chapter Western Mining Council, Arne Soares, Rand-El Paso Mountains Chapter Western Mining Council, Keith O'Hara, Doris Dietemann.

James G. Watt, the successor to the original defendant Cecil Andrus, as Secretary of the Interior, is named per Fed. R. App. P. 43.

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OPINIONS BELOW

(Reproduced in the Appendix hereto)

The Opinion of the United States Court of Appeals for the Ninth Circuit in Case No. 78-2668 is reported in 643 F2d 618. It is set out A-66 to A-84.

The Order of the Honorable Philip C. Wilkins, United States District Judge, dismissing plaintiffs' Complaint is set out at A-64. It is unreported.

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JURISDICTION

This petition for writ of certiorari is timely filed within 90 days from April 23, 1981, when the United States Court of Appeals for the Ninth Circuit entered its decision affirming the District Court's judgment dismissing plaintiffs' Complaint with prejudice.

The statutory provision believed to confer jurisdiction on this Honorable Court is 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTE AND REGULATION INVOLVED

(In pertinent part)

Constitution of the United States, Article I, Section 8 Powers of Congress: Clause 12:

> "The Congress shall have Power To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; "

Article IV, Section 3...

> "...The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States..."

Amendment IV

"Security from unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V

"No person shall* * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI

"Rights of accused in criminal prosecutions. In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation..."

Article IV, Section 3:

"* * * The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States..."

30 U.S.C. Sec. 22 Lands open to purchase by citizens.

"Except as otherwise provided, all valuable mineral deposits in lands

belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States..."

30 U.S.C. Sec. 26 Locators' rights of possession and enjoyment.

"The locators of all mining locations made on any mineral vein, lode, or ledge...so long as they comply with the laws of the United States, and with State, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations.

30 U.S.C. Sec. 35 Placer claims

"Claims usually called "placers", including all forms of deposit excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims.

30 U.S.C. Sec. 612 Unpatented mining claims - Prospecting, mining or processing operations...

"(b) Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to

manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States)...Provided however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto...."

28 U.S.C. §2201 Declaratory Judgments Act

"In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

The text of the Federal Land Policy and Management Act of 1976, Public Law 94-579, 94th Congress, 90 Stat. 2743, 43 U.S.C. §1701 et seq. is set forth in full in the Appendix A-11 to A-62.

The pertinent portion 43 CFR §3833.5, (d) and (e) is set forth at A-63.

STATEMENT OF THE CASE

The Western Mining Council, a non-profit association of miners and owners of unpatented mining claims, several of its chapters, and several individuals who mine and own unpatented mining claims filed their complaint seeking a declaratory judgment declaring unconstitutional certain sections of the Federal Land Policy and Management Act of 1976 (FLPMA) 43 USC 1701 et seq. against the Secretary of the Interior of the United States, charged with administration of the Act. A-1to A-10.

The United States District Court for the Eastern District of California denied defendant's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction under Rule 12(b)(1) Federal Rules of Civil Procedure, but granted defendant's motion to dismiss under Rule 12(b)(6) for failure to state a "justiciable claim". A-64.

Plaintiffs could not appeal from the favorable ruling of the District Court that the court had subject matter jurisdiction. This ruling necessarily included determination that the challenges to consitutionality of the Act presented a "case or controversy" under Article III, Sec. 2 of the Constitution.

Plaintiffs did appeal from the adverse ruling under Rule 12(b)(6) that they had failed to allege a claim for declaratory relief. This presented an issue of "standing" and "ripeness", whether plaintiffs themselves are entitled to challenge the Act as it affects their pursuit of mining their unpatented mining claims.

The Court of Appeals for the Ninth Circuit could properly, on its own motion, determine jurisdiction, whether a justiciable controversy was presented. The issue before the appellate court was whether

justiciable constitutional issues were stated, not to pass on the merits of the constitutional issues raised. Thus the plaintiffs were prejudiced and denied their day in court on the merits of their case.

The U.S. Court of Appeals for the Ninth Circuit had jurisdiction under 28 USC 1291.

In paragraph I of the Complaint the plaintiffs alleged jurisdiction of the U.S. District court. A-1.

In paragraph II, plaintiffs allege the direct personal interest in the controversy which gives them standing. They are owners of their mining claims, hold their perfected claims under contract with the United States under the mining law. They are in a dilemma:

> "4....If they mine their claims and do their assessment work on them, they run the risk of severe sanctions, including imprisonment under

> the Federal Land Policy and Management Act of 1976, 90 Stat. 2843, as interpreted by defendant. If plaintiffs do not mine their claims or do their assessment work required by the mining law, they run the risk of losing their claims for failure to comply with their contracts with the Government to earn the right to purchase their claims and obtain patent to them. A-2
>
> * * * *
>
> "7. Plaintiffs have been deprived of their freedom to engage in the lawful business of mining their claims under penalty of being subject to search without warrant, arrest without warrant, and fine or imprisonment, or both, for violation of orders made by low-level authorized personnel." A-3

In Paragraph III, plaintiffs allege that the defendant "is engaged in the enforcement" of the challenged provisions of the Act. A-3

In Paragraph IV, plaintiffs allege "Nature of the case for declaratory relief", the unconstitutionality of the challenged sections of the Act. Plaintiffs challenge specifically 43 USC Secs. 1701(a)(1), (13) (Sec. 102 (a)(1),(13) set out A-12 and A-13; 43 USC 1732 (b)

Sec. 302(b) of the Act, set out A-30 to A-31; 43 USC 1733 (a), (c), (e), (g) Sec. 303(a),(c),(e),(g), set out A-31 to A-32; 43 USC Sec.1734(b) (Sec. 304(b) of the Act set out A-33; 43 USC 1735(a) (Sec. 305(a) of the Act set out A-33; 43 USC 1740 (Sec. 310 of the Act set out A-35 to A-36; 43 USC 1744 (Sec 314 of the Act set out A-37; 43 USC 1761 -1764 (Secs 501 to 504 of the Act set out A-44 to A-48; and 43 USC 1781(f) (Sec. 601(f) of the Act set out A-52.

Plaintiff miners have a personal stake in the outcome of the controversy; they are asserting a present injury to their own legal rights which are threatened by the challenged provisions. 43 USC 1732(b) Sec 302(b) of the Act (A-31) specifically amends the Mining Law of 1872 and impairs the rights of locators of claims by the last sentence:

> "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." (underscoring added).

That command makes plaintiff miners the target group of the sections of the Act which enlarge the scope of the Secretary's authority to manage and control the "use, occupancy or development" of the public lands.

As is shown in Paragraphs 15 and 20 through 26 of the Complaint (A-5, A-7, A-8) 43 USC 1732(b)(Sec 302(b) of the Act) must be read in connection with Sections 1740 and 1733 of Title 43 (Secs 310 and 303 of the Act A-35 and A-31). These sections not only authorize the defendant to promulgate rules and regulations for the management, use and protection of public lands, but also authorize defendant to administer the lands prior to the promulgation of such rules and regulations under existing rules and regulations "to the extent practical."

The "or otherwise" and "any action necessary" authorization, supplemented by Sections 302(b), 310 and 303 of the Act, empower and direct the Secretary, and his subordinates to whom he may delegate authority without restriction, to act even in the absence of promulgated regulations. They are authorized to invoke either civil or criminal sanctions against plaintiffs for conducting the digging in the ground which is an indispensable part of the "prospecting and mining" activities and "uses reasonably incident thereto" authorized by the mining law, 30 USC Sec. 612. Plaintiffs must necessarily engage in such digging when conducting the annual work, without which they will conclusively be deemed to have abandoned their claims under Sec. 314 of the Act, 43 USC 1744(c).

Paragraph 6 of the Complaint (A-3) alleges the position taken by the Secretary

that plaintiffs cannot dig in the ground. "To do so, defendant says, scars the earth, destroys insects, diminshes animal and plant life, upsets the delicate ecosystem of nature. Digging is an 'unnecessary or undue degradation of the lands'. We can stop you from mining if you dig in the ground."

The Western Mining Council and its chapters also have a direct stake in the controversy, for they allege that their existence depends upon the ability of their members to pay dues. It is well established that a trade association has standing to represent the interests of its members who are threatened in the conduct of their day-to-day business by legislation which is challenged as being unconstitutional on its face. Abbott Laboratories v. Gardner, 387 U.S. 136 (1966).

REASONS FOR GRANTING THE WRIT

There is a direct conflict between the decision of the Court of Appeals for which review is being sought and decisions of the Supreme Court of the United States.

The decision below held that plaintiffs lack standing for failure to allege threatened or actual injury . This is a direct conflict with Doe v. Bolton, 410 U.S. 179 (1973) which holds that the physician-appellants need not be "threatened or prosecuted" to have standing to challenge the constitutionality of legislation which restricted their opportunity to practice and thus gave rise to a "case or controversy" Article III, Sec. 2 of the Constitution of the United States.

In the physicians' case and here in the miners' case, criminal statutes were involved. In Bolton, an anti-abortion statute interfered with the doctors' following

a gainful occupation. The Court said

> "We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. Crossen v. Breckenridge, 446 F2d 833, 839-840 (CA 6 1971); Poe v.Menghini, 339 F Supp 986, 990-991 (Kan. 1972)." 410 U.S. at page 188.

This Honorable Court cited with approval Crossen v. Breckenridge. The Crossen court said:

> "Nor do we think that the Constitution requires litigants to subject themselves to the possible harm of a criminal prosecution before seeking relief from an allegedly unconstitutional statute, when actual inter-

ference with protected rights is alleged or shown." 446 F2d 839-840.

In reaching its decision in Doe v.Bolton, the Supreme Court stressed the fact that the Georgia abortion statute had only recently been enacted as evidence that the action presented a real controversy, even though no one had been prosecuted or threatened with prosecution. Here, plaintiffs filed their complaint in 1977 challenging the constitutionality of the Act of October 21, 1976.

The insistence upon a direct threat of prosecution having been made to plaintiff, as was required in United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947) has been abandoned. In 1970, Professor Kenneth Culp Davis observed in his Administrative Law Treatise that not a single decision since 1958 had adopted the same attitude toward standing and ripeness as Mitchell. To insist upon plaintiffs' already having run afoul of a statute before they can challenge its constitutionality

would destry the usefulness of the Declaratory Judgment Act as a device to enable parties to avoid having to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity, as Congress intended the act should be. Davis, Administrative Law Treatise Sec 21.00 at 670, Supp. 1970. See Senate Report 1005 73rd Cong. 2d Sess. 2,3 (1934).

There is conflict between U.S. v. Mississippi, 380 U.S. 128(1965), U.S. v. Employing Plasterers' Association of Chicago, 347 U.S. 186 (1954) and the decision of the Court of Appeals for which review is sought. The court below begins its analysis of the plaintiffs' individual claims with the statement that the truth of legal conclusions cast in the form of factual allegations would not be necessarily accepted for purposes of ruling on a 12(b)(6) motion.

In U.S. v. Mississippi, this Honorable Court held : "In considering the correctness of this ruling (dismissal under Rule 12(b)(6)) the allegations of the complaint are to be taken as true..." 380 U.S. at 143. The federal rules do not distinguish between the pleading of facts or legal conclusions so long as the other party is given notice of the claim. In United States v. Employing Plasterers Association of Chicago, supra, the Supreme Court of the United States ruled similarly. In that case, where the district court had dismissed the complaint for failure to state a cause of action, the Court said:

> "The complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called 'allegations of fact" or "mere conclusions of the pleader", we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried. 347 U.S. at 188-189.

* * * *

> "If a party needs more facts, it has a right to call for them under Rule 12(e) of the Federal Rules of Civil Procedure 28 USCA. And any time a claim is frivolous an expensive full dress trial can be avoided by invoking the summary judgment procedure under Rule 56." Id at 189.

Standing here does not depend entirely upon danger of criminal prosecution. We are guided by the Supreme Court decision of Abbott Laboratories v. Gardner, 387 U. S. 136 (1967). In Abbott Laboratories, this Court found that plaintiffs had standing to sue prior to enforcement of the challenged regulation because it was directed at their business as drug companies.

> "Where a regulation requires an immediate and significant change in plaintiffs' conduct of their affairs with serious penalties attached to noncomplaince, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here." 387 U.S. at 153.

The "legal interest test goes to the merits. The question of 'standing' is different. It concerns, apart from the 'case or controversy' test the question whether the interest sought to be protected by the claimant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." Data Processing Service v. Camp, 397 U.S.150, 153 (1969)

Here, the right involved "is a legal right,--one of property, one arising out of contract, one founded on a statute which confers" a property right. Plaintiffs as the owners of mining claims acquired vested rights to their property under 30 USC Sec 22 Lands Open to Purchase by Citizens, and under 30 USC Sec. 26 Locators' Rights of Possession and Enjoyment, pp. 8 and 9 supra. Sec. 302 (b) of the Act, 43 USC 1732(b) amends the Mining Law. As to plaintiffs' claims lo-

cated prior to October 21, 1976, FLPMA retroactively changed plaintiffs' ownership from a matter of right to a matter of grace in the absolute discretion of an authorized officer. Plaintiffs allege additional conditions imposed upon their contracts with the United States A-4. Plaintiffs have standing to protect their vested interests in mining claims owned by them against dimunition of their rights to property caused by enactment of FLPMA. Plaintiffs' position is supported by Data Processing Service, supra, 397 U.S. at 153. See also FCC v. Sanders Bros. Radio Station, 300 U.S. 47.

Plaintiffs' petition should be granted. This case is of great importance to a large number of citizens. Not only the plaintiffs parties to this action, but the other members of the plaintiff trade

associations and all owners of unpatented mining claims are affected by the challenged provisions of FLPMA.

There are economic reasons of national importance why the writ of certiorari should be granted here.

A recent executive order designed to free the mining industry from excessive bureaucratic regulation shows the concern of the Administration for domestic production of metals. The critical shortage of strategic minerals is a threat to our national defense. It is the individual miner or small company who produce over 80% of all the gold, platinum, cobalt, nickel, chrome and other strategic minerals mined in the State of California.

> "On any given day in this country, according to defense analyst William Schneider, Jr., of the Hudson Institute, the equivalent of three of the Air Force's 26 fighter wings are grounded for a lack of spare parts. 'On the F-15, for example,' he notes, 'there's a serious shortage of critical high-temperature

> engine core parts due to a lack of cobalt.'
>
> The United States is also dependent upon the platinum group of metals and chromium for many industrial products. These minerals are found in the Soviet Union and South Africa, a nation beset by racial problems and increasing African guerrilla pressures and terrorist attacks. Should our supplies of these vital materials from South Africa be cut off, we would experience a sharp drop in our standard of living, which could eventually threaten the entire Western world." Fred Warshofsky, "Strategic Minerals - The Invisible War" in Reader's Digest February 1981.

Richard Arbo, one of the plaintiffs here, sought a declaratory judgment before he was prosecuted and convicted of violation of a regulation or order under FLPMA. His bail was set at $100,000 at the request of the agency. Since filing a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit from the judgment rendered in the U.S. District Court for the Eastern District of California, he has been free on his own recognizance. A number of other members

of the trade association are facing similar charges for violation of agency regulations or orders. Economy of judicial time would be served by granting certiorari in the present case. The constitutionality of the challenged provisions of FLPMA should be tested before cases arising under it proliferate. Plaintiffs should be permitted to have trial on the merits.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari be granted.

July 20, 1981.

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